No. 85989-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CLARK COUNTY WASHINGTON, THE CITY OF LA CENTER, GM CAMAS LLC, MACDONALD LIVING TRUST, RENAISSANCE HOMES, AND STERLING SAVINGS BANK,

Appellants,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, JOHN KARPINSKI, CLARK COUNTY NATURAL RESOURCES COUNCIL, & FUTUREWISE,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS KARPINSKI, CCNRC & FUTUREWISE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. STATEMENT OF THE CASE

Under the Growth Management Act (GMA), a county may designate unincorporated territory as part of a city's Urban Growth Area provided that the territory meets certain criteria set forth in the Growth Management Act ("GMA").[1] From the start, the gravamen of this case was the question of whether Clark County had properly de-designated area CA-1 from Agricultural Land of Long Term Commercial Significance (ALLTCS), opting to transfer it to the City of Camas' unincorporated UGA.[2] RCW 36.70A.320(1) provides that an amendment to a county's comprehensive plan (such as the de-designation of CA-1) is "presumed valid upon adoption. RCW 35.15.005 and RCW 35A.14.005 limit the territory that a city may annex to territory that is already included within the city's UGA.

Karpinski, Clark County Natural Resources Council (CCNRC), and Futurewise ("Karpinski") challenged Clark County's de-designation and UGA amendment in a Petition for Review filed with the Growth Management Hearings Board.[3] During the pendency of the review by the

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[1] "An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth" RCW 36.70A.110(1).

[2] The case below involved other areas, but argument is limited to area CA-1 pursuant to the Court's Order accepting review, entered September 6, 2011.

[3] Formerly the Western Washington Growth Management Hearings Board, *but see* Laws of 2010, ch. 211, §§4-5, 18.

Board, parcel CA-1 was annexed by the City of Camas. The City of Camas was a party to the then-pending litigation before the Board and the subsequent appeal to the Superior Court.

The annexation created a quandary for Karpinski because a city's UGA is, as a matter of law, required to include all the land within that jurisdiction's territorial boundaries pursuant to RCW 36.70A.110(1). If legally annexed, Karpinski's argument that the CA-1 area should not have been designated by the County as part of a UGA would have become moot by operation of RCW 36.70A.110(1) ("Each city that is located in such a county shall be included within an urban growth area").

Taking RCW 36.70A.110(1) and RCW 36.70A.320(1) together, it appeared at the time that by adopting legislation annexing CA-1 before the GMHB had issued a decision determining the validity of the de-designation, the City had managed a clever *fait accompli*, rendering the issues related to the annexed areas moot. The reasoning was that as an annexed part of the City of Camas, the parcel had to be part of Camas' UGA as required by RCW 36.70A.110(1). Based upon this interpretation of the law, Karpinski stipulated to reversal of the decision of the GMHB which had found non-compliant the County's de-designation of the CA-1 area from ALLTCS. Having so stipulated, Karpinski perceived that stipulation to have become the law of the case.

II. SUPPLEMENTAL ARGUMENT

A. JURISDICTIONAL AND PARCEL CA-1 ISSUES WERE PROPERLY ADDRESSED AND RIGHTLY DECIDED BY THE COURT OF APPEALS AND ARE PROPERLY BEFORE THIS COURT.

Because of the stipulation between the parties at the Superior Court that the annexation of area CA-1 worked to deprive the Superior Court of jurisdiction to review the County's actions related thereto, the Petition to the Court of Appeals did not directly assign error associated with the de-designation of CA-1. The issue was, nevertheless, addressed by the parties in briefing. This raises the threshold question of whether the issues relating to jurisdiction and CA-1 were properly before the Court of Appeals and, by extension, whether they are properly before this Court. The Court of Appeals concluded that the CA-1 issues were properly before it. It did not err in this conclusion.

The Court of Appeals concluded that to adequately review the errors assigned by the parties, it "must address the timing and effective date of UGA boundary amendments, the effect of County and Growth Board actions on issues pending review before [the Court of Appeals], and the proper standard for dedesignating ALLTCS." *Clark County v. Western Washington Growth Mgmt. Hearings Bd.*, 161 Wn. App. 204, 216, 254 P.3d 862 (2011). The Court specifically found unpersuasive the County's argument—advanced in its opening brief to the Court of Appeals—that

parcel CA-1 issues were moot because the "cities' annexation of the lands deprived the Growth Board and reviewing courts of jurisdiction." *Clark County*, 161 Wn. App. at 222. The Court based this conclusion upon, *inter alia*, RAP 1.2(a); RCW 34.05.570(3)(d); and *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 592 P.2d 631 (1979) (establishing, essentially, that the merits may be reached despite technical violation of RAP 10.3, if nature of challenge is clear and briefed by parties). *Clark County*, 161 Wn. App. at 222.

In addition to the grounds identified by the Court of Appeals, this Court has explicitly found that where—as here—the parties erroneously concede or interpret a question of law, a reviewing court is not obliged to accept the erroneous concession. In *Thurston County v. Western Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 190 P.3d 38 (2008), Thurston County had conceded, during oral argument before the GMHB, that densities greater than one dwelling unit per five acres were not rural densities, based upon a bright-line test previously established by the Board. On review, this Court found that "whether a bright-line rule regarding what constitutes a rural density exists is a question of law." *Id.* at 358 n.19. The Court went on to explain that a court "is not bound by a counsel's erroneous concession concerning a question of law." *Id. citing State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988).

In this case, the Court of Appeals correctly apprehended that the parties below had entered into an erroneous stipulation concerning a question of law. "Whether or not such a concession was made is unimportant," when the matter reaches an appellate court. *In re Dunn's Estate*, 31 Wn.2d 512, 528, 197 P.2d 606 (1948).

Because resolution of the question was inherently necessary to resolve the questions presented for review, and because the issue was addressed by the parties in their briefing to the court, the Court of Appeals rightly disregarded the erroneous stipulation and determined the question, which was its responsibility, the issue "being one of law to be determined from admitted facts." *Id.*

B. A CITY CANNOT AVOID JUDICIAL REVIEW OF THE DE-DESIGNATIONS OF AGRICULTURAL LANDS BY ANNEXING THOSE LANDS WHILE THEIR STATUS IS UNDER TIMELY FILED REVIEW BY THE GMHB AND THE COURTS.

1. The Growth Management Act does not deprive the GMHB or courts of jurisdiction to review a county's legislative actions taken under its provisions.

RCW 36.70A.320 sets forth the presumptions and burdens of proof applicable in a challenge before the GMHB. Subsection (1) provides that on review, comprehensive plans and development regulations are presumed valid upon adoption by a county planning under the Growth

Management Act ("GMA"); subsection (2) establishes that the burden of proof is on the petitioner to demonstrate that any action taken by a state agency, county, or city under the GMA is not in compliance with the requirements of the GMA; subsection (3) sets forth the standard of review, providing the "board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous;" and subsection (4) shifts the burden of proof upon a finding of invalidity while subsection (5) integrates the effective date of GMA actions with the Shoreline Management Act (chapter 90.58 RCW).

The provisions contained in subsections (1)-(3) are very well known to GMA practitioners in Washington and have been the subject of considerable litigation before this and other courts. Unfortunately, the familiarity with the oft-quoted proposition that "a county's legislative enactments are presumed valid upon adoption" created something of a blind spot in this case. While the foregoing statement of the law is an accurate and useful heuristic in litigating challenges under the GMA, this case reveals its limitation. To wit, while it accurately describes the presumption and burden of proof applicable to *the parties* and the *agency* involved in litigating and determining whether local legislative actions are GMA compliant, it does not accurately state the actual legal effect of such

legislation. As the Court of Appeals had no trouble seeing, RCW 36.70A.320(1)

> addresses the burdens, presumptions, and standards that govern the *review* of a county action by the Growth Board. The purpose of the Growth Board's review is to determine the legitimacy of a county's actions that have been timely challenged. Although RCW 36.70A.320(1) creates a presumption of validity of the county's actions *that must be applied by the Growth Board during its review*, the statue does not create a presumption of validity such that other entities can act in reliance on challenged land us decisions before the Growth Board and/or appellate court terminates its review.

Clark County, 161 Wn. App. at 224 (emphasis *sic*).

The interpretation given to 36.70A.320(1) by the parties below would convert the presumption of validity into an irrebuttable presumption; it would amount to nothing less than a legislative declaration of absolute validity, as demonstrated by the events in this case. Such a result would be absurd, given that the legislature has created an agency specifically tasked with adjudicating challenges to the legislative actions of local governments under the GMA. Courts presume that the legislature did not intend an absurd result. *Cannon v. Dep't of Licensing*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002). As the Court of Appeals put it, under the parties' interpretation of the law, "the GMA would be unenforceable... The legislature did not intend to permit counties to evade review of their GMA planning decision in [this] manner." *Clark County*, 161 Wn. App. at 225.

RCW 36.70A.320(1) does not work to allow a county or city to completely evade quasi-judicial and judicial review by adopting legislation while the validity of a prior legislative action is being considered by the courts in a timely filed challenge brought according to law.

2. The vested rights doctrine does not insulate the City of Camas from the GMHB rulings.

The Court of Appeals also considered the question of whether the City's "right" to annex CA-1 "vested" at the time the County designated it as part of the Camas UGA. The issue arose in the context of RCW 36.70A.302 which establishes that GMHB determinations of invalidity are prospective in effect and do not "extinguish rights that vested under state or local law before receipt of the board's order by the city or county." RCW 36.70A.302(2). The Court of Appeals concluded that the city's "right to annex the lands purportedly added to their UGAs had not yet vested under state law." *Clark County*, 161 Wn. App. 225. The Growth Management Act and Washington's Vesting Doctrine do not and cannot limit the power of the judiciary to review a Camas' actions in this case for several reasons.

First, While the Court of Appeals' conclusion is correct, it may have erred in its legal reasoning because under Washington law, it is not

possible for a municipal corporation to "vest" in the present context. *Concerned Organized Women and People Opposed to Offensive Proposals, Inc. v. Arlington,* 69 Wn.App. 209, 225, 847 P.2d 963 (1993), *review denied*, 122 Wn.2d 1014, 863 P.2d 73 (1993); *Bridle Trails Community Club v. Bellevue,* 45 Wn.App. 248, 251, 724 P.2d 1110 (1986).

In Washington land use law, "vesting" refers generally to the rule that a development application, under the proper conditions, will be considered under the land use statutes and ordinances in effect at the time of the application's submission. *Friends of the Law v. King County*, 123 Wn.2d 518, 522, 869 P.2d 1056 (1994); *Vashon Island Comm. for Self-Government v. Washington State Boundary Review Bd.*, 127 Wn.2d 759, 767-68, 903 P.2d 953 (1995); *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958).

The vested rights doctrine is based on constitutional principles of fundamental fairness for private property owners, reflecting an acknowledgment that private development rights are valuable and protectable property rights. *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 870, 872 P.2d 1090 (1994). "A vested right involves 'more than ... a mere expectation'; the right must have become 'a title, legal or equitable, to the present or future enjoyment *of property.*'" *In re F.D.*

Processing, Inc., 119 Wn.2d 452, 463, 832 P.2d 1303 (1992) (citations omitted, emphasis supplied).

In *Vashon Island*, this Court rejected the proposition that vesting concepts apply to municipal incorporations. There, a committee seeking to incorporate a city asserted that it was entitled to do so under the law in effect when it submitted a complete application to the Boundary Review Board of the State of Washington for King County. After the application was submitted, the law changed to exclude the proposed incorporation because the area comprising the proposed city was entirely outside of designated urban growth areas of King County.

In the present case, as in *Vashon Island*, the Court is not confronted with an application to develop property, nor is this a case dealing with a type of development decision that an applicant can vest too. *Teed v. King County*, 36 Wn. App. 635, 644, 677 P.2d 179, 185 (1984) (vested rights not applicable to rezones).

As this Court has explained, a municipal corporation is always subject to a change in the law:

> [M]unicipal corporations are merely political subdivisions of the State and the "number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, 28 S.Ct. 40, 46, 52 L.Ed. 151 (1907). Laws governing the creation of cities are, of course, subject to change and, in our judgment, no person or organization

> possesses a constitutionally protected right to have an incorporation petition considered under a law existing at the time it gave notice of its intention to seek incorporation of a certain area. *See Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 433, 799 P.2d 235 (1990) ("A party has no vested right in the continuation of existing statutory law.").

Vashon Island, 127 Wn.2d at 768.

In the case at bar, the City of Camas did not vest to a right to annex territory. Any such right "rests in the absolute discretion of the State." Indeed, a city does not even have a vested right in its continued existence. The State is free to completely do away with a political subdivision at its will. "In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state." *City of Trenton v. New Jersey,* 262 U.S. 182, 187, 43 S.Ct. 534, 537, 67 L.Ed. 937 (1923). If, as the Supreme Court went on to hold, a "municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit," *Id.*, then it is not possible for Camas to have "vested" to a right to annex CA-1 anymore than it is possible for Camas to claim a right to exist or for the *Vashon* committee to claim a right to vest to incorporation rules in effect at the time of its application to the Boundary Adjustment Board. However great or small its sphere of action,

Camas remains only a "creature of the state exercising and holding powers and privileges subject to the sovereign will." *Id.*

Applications to subdivide, for building permits, and for similar project permits may enjoy vested rights if land use regulations change after the application is complete. But this Court has repeatedly noted that the vesting doctrine undermines the public interest in assuring that current laws are obeyed and that, consequently, it will not expand the vesting doctrine to cover situations other than those already covered by the rule. *Erickson & Assocs.*, 123 Wn.2d 864. Yet Camas seeks a new ruling that cities enjoy vested rights to annex land. The Court of Appeals correctly determined this issue because neither the vested rights doctrine nor section 302 provide legal justification for Camas' purported annexation.

Section 302, by its plain terms, addresses only the power of the Board. It states that the Board may invalidate a local enactment only if certain findings are made and, even then, only prospectively. The Legislature imposed no such limitation on the power of the judiciary, nor could it without violating the separation of powers doctrine. *See* generally, *Carrick v. Locke,* 125 Wn.2d 129, 134–35, 882 P.2d 173 (1994) ("...the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine."); *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310,

316 (2009).

In addition, as the Court of Appeals explained, even if a municipality could advance a claim for vested annexation rights, such a right would not have vested "yet," *i.e,* while agency and judicial appeals were still pending. *Clark County*, 161 Wn. App. at 225. As explained in the analysis of section 320, any such holding would render the GMA's administrative and judicial review provisions illusory. "[T]he GMA would be unenforceable... The legislature did not intend to permit counties to evade review of their GMA planning decision in [this] manner." *Id.* at 225

3. The Growth Management Act cannot preclude meaningful judicial review.

Courts have inherent authority to review judicial and non-judicial actions of administrative agencies pursuant to article 4, section 6 of the Washington constitution. *Concerned Organized Women,* 69 Wn.App. at 225.

Thus, even assuming, *arguendo*, that the Legislature intended the procedural presumption contained in RCW 36.70A.320—that on review, comprehensive plans and development regulations are presumed valid upon adoption by a county—to deprive the courts of jurisdiction when a

territory was annexed during the pendency of a timely-filed challenge, this would be an unconstitutional usurpation of the role of the judicial branch.

In *Saldin Sec., Inc. v. Snohomish County*, the Court of Appeals considered whether the courts were bound by the policy determination embodied in the State Environmental Policy Act (SEPA) denying meaningful judicial review of a county council's determination that Environmental Impact Statements would be required for a development project based upon the fact the potential harm to developers was considered by the Legislature to be a reasonable tradeoff. *Saldin Sec., Inc. v. Snohomish County*, 80 Wn.App. 522, 528-29, 910 P.2d 513 (1996). The Court of appeals concluded that courts were bound by that legislative policy decision. *Id.* This Court reversed, finding that the Legislature may not "tradeoff" a person's constitutional right to a judicial review—a writ of certiorari in that case. *Saldin Securities, Inc. v. Snohomish County*, 134 Wn.2d 288, 295-296, 949 P.2d 370, (1998).

This court has repeatedly held that "the court's 'constitutional power of review cannot be abridged by legislative enactment.'" *Kreidler v. Eikenberry,* 111 Wn.2d 828, 835, 766 P.2d 438 (1989) (*quoting State ex rel. Cosmopolis Consol. Sch. Dist. 99 v. Bruno*, 59 Wn.2d 366, 369, 367 P.2d 995 (1962)); see also *State ex rel. Hood v. Personnel Board*, 82 Wn.2d 396, 399, 511 P.2d 52 (1973) (the Legislature may decide whether

a state agency may appeal from an adverse decision; however, this is "always subject to the inherent constitutional power of the judiciary to review illegal or manifestly arbitrary and capricious actions"); *North Bend Stage Line v. Department of Pub. Works*, 170 Wash. 217, 228, 16 P.2d 206 (1932) (appellate jurisdiction of the court is defined by the constitution and cannot be diminished by the Legislature); *Bridle Trails*, 45 Wn.App. at 251 n. 4, 724 P.2d 1110 ("[r]eview under the court's inherent powers may not be impinged by the Legislature"); *Dorsten*, 32 Wn.App. at 789, 650 P.2d 220 (a statutory limitation of judicial review does not abridge a court's constitutionally inherent power of review).

A statutory limitation of judicial review cannot interfere with the court's constitutionally inherent power of review. If the GMA did, in fact, remove the opportunity or fail to provide for effective review from the County's legislative action, the Court would still have independent authority to review the action. This authority cannot be limited by the legislature. *Saldin*, 134 Wn.2d at 295.

C. THE APPELLANTS CANNOT CARRY THEIR BURDEN BECAUSE THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE BOARD'S DECISION.

The APA governs judicial review of GMHB actions. *Thurston County*, 164 Wn.2d at 341, 190 P.3d 38; *see also* RCW 36.70A.300(5). "The burden of demonstrating the invalidity of [an] agency action is on the

party asserting invalidity," here the County and the other Appellants. RCW 34.05.570(1)(a); *Thurston County*, 164 Wn.2d at 341, 190 P.3d 38. On appeal, this Court sits in the same position as the superior court and applies the APA review standards directly to the record before the agency. *King County v. Central Puget Sound Growth Management Hearings Bd. (Soccer Fields)*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (*quoting Redmond*, 136 Wn.2d at 45, 959 P.2d 1091). In addition, like the GMHB, the Court defers to the County's planning action unless the action is "clearly erroneous." *Brinnon Grp. v. Jefferson County*, 159 Wn. App. 446, 465, 245 P.3d 789 (2011); *see* RCW 36.70A.320(3); *Quadrant Corp. v. Cent. Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005).

Under the APA, the Court grants relief from an agency's order after an adjudicative proceeding if it determines, in relevant part, that

> (d) [t]he agency has erroneously interpreted or applied the law;
>
> [or]
>
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter.

RCW 34.05.570(3).

RCW 36.70A.290 governs what constitutes the record before the Board and provides:

> (4) The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

Much argument in this case has revolved around the matrix developed by the County that summarized the evidence considered and relied upon by the County in making its de-designation decisions.[4] The matrix in this case is part of the record and represents the clearest statement of the facts deliberated upon by the County and the conclusions the County reached after considering those facts. It was created by the County and used by the Board of County Commissioners during its deliberations. It is evidence which the Board was obliged to consider.

There is substantial evidence supporting the GMHB's Decision. The Board's responsibility in this case was to review the entire record—all of that evidence—and determine whether the policy choices of the County were consistent with the requirements and goals of the GMA. Futurewise highlighted in its opening brief to the Court of Appeals the substantial

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[4] The Matrix is CP 24, Index 6605, Issue Paper 7, attachment A and is attached to Futurewise's opening brief to the Court of Appeals as Exhibit "A."

evidence, which is consistent with the requirements and goals of the GMA, establishing the CA-1 area *is* agricultural resource lands of long term commercial significance, as defined by the GMA.

There is no question that *if* the GMA excepted from its mandate to designate and conserve agricultural resource lands those lands which could be put to higher use, the Appellants would prevail in this case. So too, if the GMA excepted from its mandate to designate and conserve agricultural resource lands those lands which were not presently in agricultural production, Appellants would likely prevail in this case.

But after reviewing the evidence, the GMHB found that in some instances, the decision of the County resulted from reliance upon impermissible factors. One example cited in Futurewise's opening brief to the Court of Appeals was that "unique economic development opportunities" was identified as a basis for de-designation. But diversifying economies or school district tax bases and similar factors that the County used to justify its agricultural de-designations are not valid GMA agricultural lands designation criteria. *Lewis County*, 157 Wn.2d at 499-502. Nor are they Clark County agricultural lands designation

criteria.[5] In this way, the land at issue here is quite different than the land necessary to support the agricultural industry that Lewis County incorporated into its definition of agricultural land that it used to designate agricultural lands of long-term commercial significance. *Lewis County*, 157 Wn.2d at 499. Here the county never included such considerations in its criteria.

Further, as the Board pointed out, there was nothing in the record showing how much land the jurisdictions needed for "unique economic development opportunities" or whether sites other than agricultural lands of long-term commercial significance had been considered. *Karpinski v. Clark County*, WWGMHB Case No. 07-2-0027, Final Decision and Order Amended for Clerical and Grammatical Errors (June 3, 2008) at 67. So it does not even relate to the possibility of more intense uses of the land, one of the long-term commercial significance factors in RCW 36.70A.030(10), as there is no evidence showing a need for this land. Tellingly, in arguing about their economic need for the land the City of La Center cited nothing in the record to prove that claim.[6]

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[5] CP 24, Index 6512, *Clark County Comprehensive Plan 2004-2024: Chapter 3 Rural and Natural Resource Element* pp. 3-7 – 3-8.
[6] LaCenter's Response Brief to the Court of Appeals at 34–35.

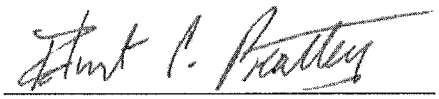
It is this type of error by Clark County that the GMHB found to be clearly erroneous. As there is substantial evidence supporting the Board's decision, the GMHB did not err.

III. CONCLUSION

For the foregoing reasons, and each of them, Futurewise, Karpinski, and CCNRC respectfully request the Court affirm the decision of the Court of Appeals and the Growth Management Hearings Board.

DATED 19 December 2011, and

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on this 19th day of December, 2011 he caused the following documents to be served on the following parties by regular U.S. Mail, postage prepaid: Brief of Appellants Karpinski, CCNRC, & Futurewise.

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